IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03.02.2007

Coram:

The Honourable Mr. Justice V. DHANAPALAN

W.P. No.1352 of 2003

N. Munusamy ..Petitioner

Vs.

1. The Managing Director
The Tamil Nadu Water Supply and Drainage Board
TWAD Board Office
31, Kamarajar Salai
Chepauk, Chennai - 600 005

2. Tamil Nadu Water Supply and Drainage Board
represented by its Managing Director
TWAD Board Office
31, Kamarajar Salai
Chepauk, Chennai - 600 005 .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari as stated therein.

For petitioner : Mr. T.N. Rajagopalan

For respondents : Mr. Patty B. Jeganathan

O R D E R

The petitioners seeks to call for the records made in B.P. Ms. No.58 (TWAD-Estt.(DP) Wing) dated 06.02.2001 as confirmed by the order in B.P.Ms.No.156 (TWAD-Estt.(DP)Wing) dated 29.05.2001 passed by the respondents and for issuance of a writ of certiorari quashing the part fixing minimum scale of pay of Junior Assistant and taking away his past service as an Office Assistant.

2. The facts that are necessary for the disposal of this writ petition, as culled out from the petitioner's affidavit, are as follows:

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i. The petitioner, who holds a pass in the S.S.L.C. examination, was appointed in the Highways Department, Chennai as an Office Assistant on temporary basis and was since retrenched for want of vacancy. Pursuant to the interview conducted by the second respondent Board, he was appointed there as an Office Assistant on 28.10.1980 and was subsequently promoted as Junior Assistant with effect from 14.09.1988 and his services were also regularized.

ii. While so, he was issued with a Charge Memo dated 12.04.1990 stating that he had failed to produce his employment registration card and the previous experience certificate to support his claim as a retrenched employee. In response, he submitted an explanation on 04.10.1990 denying the charges levelled against him. In the circumstances, he was served with a proceedings dated 28.02.1991 by the first respondent, removing him from service with effect from that date stating that the charges leveled against him stood proved.

iii. Being aggrieved by the order of removal, he filed a writ petition in W.P. No.3661 of 1991 which was admitted and stay granted and at the stage of final hearing, based on the submission made by the counsel for the respondents that in similar circumstances, the respondents had proposed to stop one increment wherever the petitioners were not recruited through the Employment Exchange, this Court dismissed the writ petition with a direction to the respondents to consider the petitioner's appeal on par with the other employees whose appeals had been disposed of.

iv Acting upon the afore-said order of this Court, the respondents passed an order in B.P. Ms.No.58 (TWAD-Estt.(DP) Wing) dated 06.02.2001 to the effect that the petitioner may be continued as Junior Assistant subject to the condition that his pay should be fixed in the minimum of Junior Assistant’s scale and that his past service should not be taken into account. Questioning this order, the petitioner filed a Memorial Petition dated 23.02.2001 and the same was rejected and the order dated 06.02.2001 stood confirmed.

v. Though he had given various petitions pointing out that for similar charges, certain other persons were punished with stoppage of three

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increments, the order passed by the respondents taking away his entire past service is in violation of Articles 14 and 16 of the Constitution of India and hence, this writ petition, seeking a writ of certiorari.

3. The respondents have filed their counter and their case is as below:

i. The petitioner was initially appointed as an Office Assistant in the respondent Board from among the candidates in the "retrenched list" sponsored by the Collector of Madras and was later promoted as Junior Assistant. From the investigation made by the Chief Vigilance Officer of the respondent Board, it came to be detected that the petitioner was in possession of neither the Employment Registration card nor the experience certificate to prove his claim as a retrenched employee. Hence, after issuance of Charge Memo to him, an Enquiry Officer was appointed to enquire into the charges framed against him.

ii. The Enquiry Officer, based on the deposition of the petitioner in the course of enquiry that his house was burnt and he had not taken any step to produce the original employment registration card, held the first charge of non-production of employment card as proved. As regards the second charge, the certificate produced by the petitioner showed his service as from 07.02.1975 to 29.02.1976 whereas as per the Vigilance enquiry, it is from 07.02.1975 to 03.12.1976. In this regard, the petitioner had deposed that he worked only as a casual labour and that casual labourers are not eligible for inclusion in the retrenched list. In view of these, the Enquiry Officer held the second charged too as proved and accordingly, the petitioner was removed from service.

iii. Based on the order of this Court dismissing the writ petition filed by the petitioner with a direction that the appeal of the petitioner should be disposed of on par with the other employees whose appeals have been disposed of under similar circumstances, the petitioner submitted an appeal to the first respondent seeking to quash the order dated 28.02.1991 removing him from service and the Board, vide its order dated 06.02.2001, resolved to continue the petitioner as Junior Assistant subject to the condition that his pay should be fixed in the minimum of the Junior Assistant pay scale and his past services should not be taken into account.

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iv. As against this order of the Board in the appeal, the petitioner filed a Memorial and the Board, in its Resolution, observing that the petitioner had not produced the original employment card and he is only a casual labourer and that casual labourers are not eligible for inclusion in the retrenched list and the petitioner has not let in any new materials or facts for its consideration, rejected the Memorial Petition and confirmed the order dated 06.02.2001, which, in its view, is perfectly in accordance with law.

4. Mr. T.N. Rajagopalan, learned counsel for the petitioner would contend that while this Court has directed the respondents to dispose of the petitioner's appeal on par with the appeals of the other similarly placed persons and the respondents have punished those similarly placed persons by way of stoppage of three increments with cumulative effect, the impugned order passed by the respondents is dis-proportionate to the charges levelled against the petitioner and is contrary to the orders of this Court in W.P. No. 3661 of 1991 filed by the writ petitioner.

5. In support of his contention that the order removing the petitioner from service does not commensurate with the charges levelled against him while the other similarly placed persons were given only a lesser punishment of stoppage of three increments, the counsel for the petitioner would rely on a Division Bench judgment of the Allahabad High Court in the case of Basti Ram vs. Union of India & Others reported in 1996 (3) SLR 308 and the relevant paragraphs read as under (paras 25 and 26)

> "From the facts and in the circumstances of the present case, we are of the view that since a minor punishment was imposed, in similar set of circumstance, rather, in the same offence in which petitioner is involved, one Sri. CHM Sahu, punishment of dismissal from service, awarded to the petitioner is not commensurate to the charge of misconduct and a case of hostile discrimination has been made out by the petitioner. The impugned order of punishment, therefore, cannot be sustained in law."

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6. Per contra, Mr. Patty B. Jeganathan, learned counsel for the respondents would contend that pursuant to the order of this court in dismissing W.P. No.3661 of 1991 with the direction to the respondents to consider the appeal of the petitioner on par with the appeals of other similarly placed persons, the Board, in its resolution dated 31.01.2001, resolved to continue the petitioner in service as Junior Assistant subject to the condition that his pay should be fixed in the minimum of the Junior Assistant's scale and his past services should not be taken into account, based on which B.P.Ms.No.58 was issued giving effect to the resolution and in that view of the impugned order does not at all suffer from any infirmity and the writ petition needs to be necessarily dismissed.

7. It is the further contention of the counsel for the respondents that the Government can be bound only by a statement made by the Advocate General and in the order passed of this Court in W.P. No.3661 of 1991 relied on by the counsel for the petitioner, the counsel for the respondents was not an Advocate General and hence, that order cannot bind the respondents in this case. In support of this contention, he has relied on a judgment of this Court reported in 1995 WLR 839 in the case of The Secretary, Selection Committee, Sabarmathi Hostel, KMC Hospital Campus, Kilpauk & Others vs. Dr. R. Rajesh and the relevant para reads as under:

> "The Supreme Court has held that the Government can be bound only by a statement made by the Advocate General and any concession by Government Pleader will not be binding on the Government. Vide Periyar and Pareekanni Rubbers Ltd. vs. State of Kerala (AIR 1990 SC 2192). In the present case, it is not even a statement of a Government Pleader but it is only a Government Advocate who represented the appellants before the learned single Judge."

8. Lastly, to substantiate his argument that the quantum of punishment in disciplinary matters is primarily for the disciplinary authority rather than the High Courts and Administrative Tribunals, the counsel for the respondents has placed reliance on a judgment of the Apex Court reported in 2000 (8) Supreme 217 in the case of Om Kumar & Others vs. Union of India in Delhi Development Authority vs. Skipper Construction and another and the relevant paragraph reads as under:

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> "We agree that the question of the quantum of punishment in disciplinary matters is primarily for the disciplinary authority and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well known principles known as Wednesbury principles. (See Associated Provincial Picture Houses vs. Wednesbury Corporation). This Court had occasion to lay down the narrow scope of the jurisdiction in several cases. The applicability of the principle of 'proportionality' in Administrative law was considered exhaustively in Union of India vs. Ganayutham where the primary role of the Courts in matters not involving fundamental freedoms, was explained."

9. Heard both sides.

10. The short point involved in this case is whether the punishment imposed by the respondents on the petitioner is proportionate to the charges leveled against him and whether it is on par with the punishment imposed on the other similarly placed persons for identical charges.

11. From a perusal of the records available before this Court, it is seen that the respondents have dealt with five persons, other than the petitioner, against whom similar charges were framed and the particulars such as the charges leveled against them and the punishment imposed for the same are as under:

S. No.	Name of delinquent employee	Charges framed	Punishment initially ordered	Punishment subsequently ordered
1	N. Rajendran	Production of bogus experience certificate	Removal from service	Stoppage of increment for three years with cumulative effect

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2	M. Kuppusamy	Production of bogus certificate in respect of qualification, age and experience	Removal from service	Stoppage of increment for three years with cumulative effect
3	K. Kuppan	Production of bogus experience certificate	Removal from service	Stoppage of increment for three years with cumulative effect.
4	K. Ashok Kumar	Failure to provide employment registration card and previous experience certificate to prove that he is a retrenched employee	Removal from service	Stoppage of increment for three years with cumulative effect
5	A. Panneerselvam	Failure to provide employment registration card and previous experience certificate to prove that he is a retrenched employee	Removal from service	Stoppage of increment for three years with cumulative effect

12. A glance of the above statement would clearly indicate that the respondents have considered the case of similarly placed persons on the same lines, i.e. in all the above cases, the punishment of removal from service has been reduced to stoppage of increment for three years with cumulative effect. But, in the case on hand, the respondents have imposed punishment of continuing the petitioner in service in the minimum scale of pay of a Junior Assistant and canceling his past service as an Office Assistant, which is prima facie indiscriminate and disproportionate, as a result of non-application of mind, despite the orders of this Court in W.P. No.3661 of 1991 filed by the petitioner in and by which the respondents

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were directed to consider the petitioner's appeal on par with that of the other similarly placed persons.

13. Though the counsel for the respondents would rely on the decision of this Court reported in 1995 WLR 839 (supra) to contend that the concession given by the counsel for the respondents in W.P. No. 3661 of 1991 cannot bind the Government since the advocate who appeared for the respondents in that matter was not an Advocate General whose statement alone can bind the Government, the orders of this Court in the said writ petition have to be necessarily given effect to in the strict sense in which it was meant, even assuming that the said concession by the counsel for the respondents is not binding on the Government. But, in the instant case, it is a clear case of violation of the said order in the sense that the respondents have not given effect to the order of this Court in W.P. No.3661 of 1991 where the respondents were directed to consider the petitioner's appeal on par with that of the other similarly placed persons. Hence, this contention of the counsel for the respondents cannot have legs to stand and fails accordingly.

14. It is to be noted that had the respondents applied their mind and acted in accordance with the orders of this Court while passing orders in respect of the charges against the petitioner, they would have imposed the punishment of stoppage of increment for three years with cumulative effect for the same or even grave charges in certain cases; but, they have not done so and have acted with total non-application of mind. Moreover, I am not able to find any reason whatsoever for the action of the respondents in isolating the case of the petitioner alone by imposing such a grave punishment.

15. From the above discussion, it is clear that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary review Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here, the Court deals with the merits of the balancing action of the administrator and is, in essence, applying 'proportionality' and is a primary reviewing authority and in view of this, the reliance placed by the counsel for the respondents on the judgment reported in 2000 (8) Supreme 217 (supra) is unsustainable. Thus, when the respondents have failed to exercise due care, diligence and proper application of mind, obviously, the role of the Court comes

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into play as a reviewing authority and it has to take up the task of ascertaining whether employers have acted in the manner they ought to have. When that is not the case and the punishment imposed on the petitioner certainly shocks the conscience of the Court, I would straight-away quash the impugned order of punishment and in this regard, it would be relevant to refer to the decision of the Supreme Court reported in AIR 2000 SC 1151 in the case of U.P. State Road Transport Corporation and others vs. Mahesh Kumar Mishra and others which deals with the power of the High Courts in interfering with the punishment inflicted upon the delinquent employee and the relevant paragraph reads as under:

> "This will show that not only this Court but also the High Court can interfere with the punishment inflicted upon the delinquent employee if, that penalty, shocks the conscience of the Court. The law, therefore, is not, as contended by the learned counsel for the appellants, that the High Court can, in no circumstance, interfere with the quantum of punishment imposed upon a delinquent employee after disciplinary proceedings."

16. Having regard to the facts and circumstances of the case, I am of the considered view that the differential treatment shown to the petitioner must not only pursue a legitimate aim. It had to be proportionate as well. There had to be relationship of proportionality between the "means employed" and the "aim sought to be realized". It is always for the disciplinary authority to justify its action. If indirect discrimination were established, there must be sound reasons supported by objective justification. In the instant case, from the action of the respondents in treating the petitioner in an entirely different fashion when compared with the case of other similarly placed persons, it is clear than an arbitrary action has been shown and acted upon. Therefore, in rarest of rare cases where there has been a differential treatment in disciplinary proceedings in the case of similarly placed persons, the Court can very well substitute its own view as to the quantum of punishment. Even if the respondents were very particular in punishing the petitioner in such a grave manner, they should have spelt out valid reasons for doing so. But, that is not the case here. In that view of the matter, I consider that this is one such case where the authorities have acted upon indifferently insofar as the petitioner is concerned by imposing the punishment of continuing him in the minimum pay scale of Junior Assistant and taking away his past service as an Office Assistant.

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17. In view of the above, while setting aside the impugned order of punishment, this Court remits the matter to the appellate authority for consideration of the petitioner's appeal afresh independently, by applying its mind. While doing so, the appellate authority is directed to bear in mind, the charges framed against the petitioner by affording him an opportunity and by treating his appeal on par with the other similarly placed persons as directed by this Court in its orders in W.P. No.3661 of 1991 and to pass appropriate orders. This exercise shall be carried out by the respondents within a period of two months from the date of receipt of a copy of this order.

In fine, the writ petition is allowed with the above direction to the respondents. No costs.

cad

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

The Managing Director
The Tamil Nadu Water Supply and Drainage Board
TWAD Board Office
31, Kamarajar Salai
Chepauk, Chennai - 600 005

+ 1 cc to Mr. Patty B. Jeganathan, Advocate, SR No.6457

+ 1 cc to Mr. T.N. Rajagopalan, Advocate, SR No.6469

KSJ(CO)
SR/8.2.2007

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